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this Memorandum Decision shall not be  
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collateral estoppel, or the law of the case.

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**IN THE  
COURT OF APPEALS OF INDIANA**

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SPENCER R. NORVELL,  
  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
  
Appellee-Plaintiff.

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No. 18A02-0508-CR-819

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APPEAL FROM THE DELAWARE CIRCUIT COURT  
The Honorable Robert L. Barnet, Judge  
Cause No. 18C03-0411-FA-18

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**September 26, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**DARDEN, Judge**

## STATEMENT OF THE CASE

Spencer R. Norvell (Spencer) appeals his convictions of dealing in cocaine as a class A felony and possession of cocaine as a class B felony, after a jury trial.

We affirm.

## ISSUES

1. Whether the trial court abused its discretion when it admitted into evidence testimony that Spencer had sold narcotics to the State's confidential informant in the past.
2. Whether the trial court abused its discretion when it quashed Spencer's subpoena calling a discharged juror to testify regarding the credibility of the State's confidential informant.

## FACTS

In October 2004, Christopher Phillips (Phillips) was confronted by agents from Muncie's Delaware County Drug Task Force (DTF). They informed Phillips that on two occasions he had unwittingly facilitated the purchase of crack cocaine with a DTF confidential informant and that based upon his actions, they could charge him with two criminal narcotics offenses. DTF offered Phillips a deal. In exchange for Phillips participating in some controlled buys from Daniel Norvell<sup>1</sup> (Daniel), Phillips' drug dealer, from whom he had purchased drugs 30 to 40 times in the past, DTF agreed that drug charges would not be filed against Phillips.

On November 8, 2004, Phillips, monitored by DTF, went to the residence of Daniel to purchase crack cocaine; no one answered the door. Phillips called Daniel and told him what he wanted. Daniel told Phillips to return to Daniel's residence and wait.

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<sup>1</sup> Daniel Norvell is the older brother of Spencer.

Shortly after that conversation, Spencer arrived instead of Daniel. Spencer asked Phillips how much crack cocaine he wanted. Spencer went inside the residence and returned with the amount of the drug specified by Phillips and sold it to him; which was turned over to DTF. In a matter of hours, the State obtained a search warrant, which was served at the residence where Spencer was arrested and later charged with dealing in cocaine as a class A felony and possession of cocaine as a class B felony.

On July 18, 2005, a jury trial commenced on the charges. After Phillips testified, the trial court ordered a recess. During the recess, a juror, outside the presence of the other jurors, made the trial court aware that he knew Phillips. The juror, under examination by the trial court, testified that he worked with Phillips at a local restaurant and believed that Phillips had been involved in stealing and he was unable to believe Phillips' testimony. The trial court discharged the juror from service and replaced him with an alternate juror. Spencer subpoenaed the juror as his witness; however, the trial court quashed the subpoena.

On July 19, 2005, upon conclusion of the evidence, the jury found Spencer guilty as charged.

## DECISION

### 1. Admission of Evidence

Spencer claims the trial court abused its discretion when it admitted evidence of prior bad acts in violation of Indiana Evidence Rule 404(b). Specifically, he contends it was error to allow Phillips to testify, over his objection, regarding other drug transactions that had occurred between himself and Phillips. According to Spencer, such evidence

was irrelevant and improperly prejudiced him by implying to the jury that he had a propensity to deal in controlled substances. Additionally, Spencer argues that the admission was in error because the State had not complied with the notice requirements of Indiana Evidence Rule 404(b). In response, the State argues that the testimony of Spencer's past drug dealing with Phillips were acts which were "inextricably intertwined" with the charged offenses and thus admissible under Evidence Rule 404. State's Br. 5. Additionally, the State asserted the testimony was necessary to show that Phillips could identify Spencer.

"A trial court is vested with broad discretion in ruling on the admissibility of evidence." Edmond v. State, 790 N.E.2d 141, 144 (Ind. Ct. App. 2003), trans. denied. An error in the admission of evidence will not result in reversal of a conviction if the error is harmless. Id. "An error will be viewed as harmless if the probable impact of the evidence upon the jury is sufficiently minor so as not to affect a party's substantial rights." Id. at 144-45.

Indiana Evidence Rule 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

The effect of this rule is that evidence is excluded only when it is introduced to prove the "forbidden inference" of demonstrating the defendant's propensity to commit the charged crime. Sanders v. State, 724 N.E.2d 1127, 1131 (Ind. Ct. App. 2000). However,

“[e]vidence of uncharged misconduct which is probative of the defendant’s motive and which is ‘inextricably bound up’ with the charged crime is properly admissible under Rule 404.” Id.

Also, Spencer filed a notice of alibi in this matter. The State filed a motion to strike Spencer’s motion because it was untimely filed. The trial court held a hearing, and denied the State’s motion, and left Spencer’s alibi notice in place. On July 14, 2005, the State filed a pre-trial notice of intent to introduce potential character evidence. The notice stated that evidence of Spencer’s arrest, subsequent to the charges he faced in this matter, might be offered at trial. On July 18, 2005, the first day of trial, the trial court inquired if there were any preliminary matters to address. The State referenced its notice that had been filed four days earlier and informed the trial court that “in talking with the confidential informant this morning, there’s some additional evidence that has come to light, [defense counsel] and I have already talked about that, so we want to bring that to the Court’s attention.” (Tr. 33). Specifically, the State informed the trial court that the confidential informant had told the deputy prosecutor that he had purchased drugs from “Spencer Norvell on numerous prior occasions to November 8<sup>th</sup>.” (Tr. 49). The State asserted that it intended to present this testimony in addition to Spencer’s subsequent arrest to show intent and motive and also that the confidential informant was able to identify Spencer. The trial court denied the State’s proffer to introduce evidence of Spencer’s arrest for “subsequent crime” identified in the State’s notice of possible character evidence. (Tr. 52). Regarding the proffered testimony of Phillips that Spencer had dealt drugs to him numerous times in the past, the trial court ruled that “404(b)

Notice requirements do not apply to evidence of inextricably intertwined acts.” (Tr. 64). It continued, “404 does not apply to evidence of crimes inseparable from the charged crime sometimes referred to as intrinsic acts because such conduct does not amount to other ‘crimes, wrongs or acts.’” (Tr. 64).

Phillips testified that though he had regularly purchased drugs from Daniel, he had met Spencer at the same residence where Daniel lived and sold drugs from on numerous occasions. On direct-examination the prosecutor asked Phillips:

[Prosecutor]: Did you have occasion to purchase cocaine from Spencer Norvell?

[Defense Counsel]: We’re going to object for the record, Your Honor. And I’d like to establish a time if we might, as well.

The Court: Fix a time, Counselor.

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[Prosecutor]: Okay. Do you recall approximately when it was the first time that you bought cocaine from Spencer Norvell in 2004?

[Phillips]: Maybe a couple of months after I met Danny. I’m not real for sure, to be honest with you, but it was several, over a period of time. Maybe Danny wouldn’t be there and he’d tell me to go get it from his brother, so.

[Prosecutor]: Okay. Do you recall the last time prior to November the 8<sup>th</sup> that you bought from Spencer Norvell? Was that a week before, a month before?

[Phillips]: Probably a week. Maybe a week. A week to (8) days. I don’t know for sure. Not, not a long period of time, so.

(Tr. 117-118). Phillips went on to testify that most of the drug transactions occurred in the same residence when he purchased drugs from Daniel. He further testified that both brothers would get the cocaine from the same drawer in the kitchen of the residence.

In this matter, Spencer put on an alibi defense and presented several witnesses that testified as to his whereabouts on the day in question. Most notably, Daniel testified that

Spencer never sold drugs for him; that on the day in question, he did not send Spencer to sell drugs to Phillips; and that Spencer was not at all involved in the drug trade.

Since Daniel and Spencer are brothers, the testimony provided by Phillips regarding Spencer's identity and drug transactions with him was highly probative in showing that Spencer was the person that sold drugs to Phillips on the date in question. Further, the evidence was "inextricably bound up" with the charged offense as it was "proof of motive, intent, . . . plan, . . . identity, or absence of mistake or accident." See Evid. R. 404(b); Pope v. State, 740 N.E.2d 1247, 1250 (Ind. Ct. App. 2000). Therefore we cannot say that Phillips' testimony of past drug transactions between himself and Spencer was offered only to create an inference that Spencer sold crack cocaine to Phillips on November 8, 2004 because he is a person with a propensity for selling drugs.

Inasmuch as the evidence was highly probative of Spencer's perpetration of the charged offenses, we decline to hold that the danger of unfair prejudice that may have inured to Spencer substantially outweighed the probative value of the evidence in these circumstances. Thus, there was no error in the admission of this evidence.

Regarding Spencer's argument of insufficient notice, our review of the record reveals that he did not preserve this issue for appeal. When Spencer raised an objection at trial to the testimony based on insufficient notice, the trial court asked Spencer "Was there a request for the notice. . . ?" (Tr. 57). Spencer responded: "Judge, we didn't know anything about that, on, so there was no request." (Tr. 57). The trial court stated: "The rule, as I read it, requires you to make a request for 404 evidence." (Tr. 57). We agree with the trial court. Further a panel of this court held:

Reasonable notice of intent to offer evidence of other crimes, wrongs, or acts is a prerequisite for admissibility. The defendant has the burden to make a 'reasonably understandable and sufficiently clear' request for such notice from the State. Moreover, a defendant who is not given notice after making a proper request must object to the State's 404(b) evidence at trial to preserve any error for appeal.

Hatcher v. State, 735 N.E.2d 1155, 1158 (Ind. 2000) (internal citations omitted); see also

Dixon v. State, 712 N.E.2d 1086, 1090 (Ind. Ct. App. 1999).

## 2. Discharged Juror

Without any authority to establish his *right* to have the discharged juror testify, Spencer contends that the trial court abused its discretion when it quashed his subpoena, under Indiana Evidence Rule 606(a), to call the discharged juror as his witness to testify regarding the truthfulness of Phillips. Spencer simply asserts that the rule does not address whether a juror can testify once that juror is dismissed from service.

To resolve this issue, we first note that a trial court is vested with broad discretion in ruling on the relevancy of evidence and its evidentiary rulings are afforded great deference. Sanders, 724 N.E.2d at 1130; Pope, 740 N.E.2d at 1250. We will reverse the trial court's rulings on appeal only upon a showing of an abuse of discretion. Id.

Indiana Evidence Rule 606(a) provides that:

A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

Further, Indiana Code section 35-37-2-3 provides:

(a) As a part of the preliminary instructions, the court shall instruct the jurors that if a juror realizes, during the course of the trial, that he has personal knowledge of any *fact material to the cause*, he shall inform the bailiff that he believes he has this knowledge at the next recess or upon



adjournment, whichever is sooner. The bailiff shall inform the court of the juror's belief, and the court shall examine the juror under oath in the presence of the parties and outside the presence of the other jurors concerning his personal knowledge of any material fact.

(b) If the court finds that the juror has personal knowledge of a material fact, the juror shall be excused and the court shall replace that juror with an alternate. If there is no alternate juror, then the court shall discharge the jury without prejudice, unless the parties agree to submit the cause to the remaining jurors.

Id. (emphasis added). A “material fact” under this statute is

any "fact" material to the cause. The type of "fact" contemplated by the statute generally includes the underlying story and what happened to bring the parties into court, the what-happened or whodunnit of the case.

Ballin v. State, 610 N.E.2d 846, 851 (Ind. Ct. App. 1993), trans. denied.

We note that neither we nor the parties have located precedent on the issue of whether a discharged juror can be called as a witness in the trial the juror had served on. Therefore, we turn to Weinstein's Federal Evidence, second edition, which reviewed Federal Rule of Evidence 606(a),<sup>2</sup> which is materially similar to Indiana's rule, for guidance. Weinstein's states:

In the unlikely event that a juror's testimony is sought during trial, the following approach seems consonant with Rule 606(a) and the other federal rules of evidence. The judge may simply exclude the juror's testimony if its probative value would be substantially outweighed by the harmful consequences specified in Rule 403 that would flow from its admission.

2 Weinstein § 606.03[2][a]. Further,

[i]f the judge finds that the juror's testimony is important, the judge should declare a mistrial . . . . The judge should not continue the trial with an alternate juror and permit the ex-juror to testify, since Rule 606 clearly

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<sup>2</sup> (a) At the trial. – A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

expresses the policy that testimony by a juror is inherently prejudicial. To avoid the problem of double jeopardy in criminal cases, consent of the parties to the granting of the mistrial should be obtained on record.

2 Weinstein § 606.03[2][c].

In the matter before us, the trial court followed the procedure as outlined in Indiana Code section 35-37-2-3. During examination by the trial court, the juror testified that he had worked with Phillips at a local restaurant for approximately nine months and believed that Phillips had been stealing. The juror went on to aver that due to his opinion of Phillips, he would be unable to be a fair and impartial juror. After the examination, the trial court discharged the juror and replaced him with an alternate.

Under the Sixth Amendment, a defendant has a right to be tried by an impartial and unbiased jury. U.S. CONST. amend. VI. Any probative value the juror's testimony regarding Phillips may have had was substantially outweighed by "unfair prejudice, confusion of the issues, or misleading the jury." Ind. Evidence Rule 403. Spencer did not ask the trial court for a mistrial in order that the juror could be called in a new trial to testify to the truthfulness of Phillips. Therefore, we conclude that the trial court did not abuse its discretion when it quashed Spencer's subpoena.

We affirm.

RILEY, J., and VAIDIK, J., concur.